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No. 75-12

In the Supreme Court of the United States

OCTOBER TERM, 1975

AIR EAST, INC., d/b/a ALLEGHENY COMMUTER, ET AL.,
PETITIONERS

v.

NATIONAL TRANSPORTATION SAFETY BOARD AND JAMES E. DOW, ACTING ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinions of the National Transportation Safety Board (Pet. App. A19–A66) and its administrative law judge (Pet. App. A67–A134) are not reported. The opinion of the court of appeals (Pet. App. A4–A18) is reported at 512 F. 2d 1227.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1975. A timely petition for a rehearing was denied on April 7, 1975. The petition for a writ of

certiorari was filed on July 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the emergency summary revocation of petitioners' aviation licenses denied them due process of law, when a full administrative hearing was held promptly after the revocation.

2. Whether the procedures used by the Federal Aviation Administration and National Transportation Safety Board in reviewing the emergency revocation of petitioners' licenses in this case complied with the requirements of due process.

STATUTES INVOLVED

Section 609 of the Federal Aviation Act of 1958, 72 Stat. 779, as amended, 49 U.S.C. 1429, is set forth at Pet. App. A1–A2.

Section 1005(a), 72 Stat. 794, 49 U.S.C. 1485(a), is set forth at Pet. App. A2–A3.

Section 1006(a), 72 Stat. 795, 49 U.S.C. 1486(a), provides:

> Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

STATEMENT

Until March 7, 1974, petitioner Air East operated a commuter airline furnishing passenger and mail service to various cities in Pennsylvania. It was certified by the Federal Aviation Administration ("F.A.A.") as a commercial air taxi service and aviation repair station. The individual petitioners were four senior Air East officials, who held F.A.A. certificates as pilots or, in the case of petitioner Reddecliff, as a mechanic (Pet. App. A5).

On January 6, 1974, an Air East plane crashed while attempting to land at Johnstown, Pennsylvania, killing twelve passengers and crew members (*ibid*). The National Transportation Safety Board (the "Board") then began an investigation pursuant to Section 701 of the Federal Aviation Act, 72 Stat. 781, 49 U.S.C. 1441, to determine the cause of the accident. In the course of this inquiry, the Board received information concerning Air East's general safety practices. This information was transmitted to the Federal Aviation Administration, which then instituted a separate investigation pursuant to 49 U.S.C. 1429 to determine whether some action should be taken in regard to the aviation certificates held by Air East and the individual petitioners. During its seven-week investigation, the F.A.A. examined company maintenance and pilot records and deposed numerous present

and former Air East employees, including the four individual petitioners and the president of Air East (Pet. A6; C.A. App. I, 245).[1]

Based upon information developed during the course of this investigation, on March 7, 1974, the F.A.A. issued emergency orders revoking all of petitioners' aviation certificates. The revocation orders set forth the grounds for the action and concluded in each instance that an emergency existed and that safety in air commerce or air transportation and the public interest required the immediate effectiveness of the orders (Pet. App. A6; C.A. App. I, 5, 10–11, 15, 20, 23, 26). Cf. 49 U.S.C. 1485(a).

As authorized by 49 U.S.C. 1429, petitioners immediately appealed the revocation orders to the Board, and on March 21, 1974, a hearing was begun before an administrative law judge. Following twenty-five days of testimony and argument, the law judge sustained all of the revocation orders (Pet. App. A67–A134). The Board affirmed the revocations and the law judge's findings except as to one charge against petitioner Tallent (Pet. App. A19–A66).

In sustaining the revocation of Air East's air taxi certificate, the Board found that Air East as a matter of company policy on numerous occasions had, *inter alia*: (1) exceeded maximum aircraft takeoff weights and center-of-gravity limitations; (2) falsified load manifests as to takeoff weights and centers of gravity; (3) used unapproved instrument landing approaches at two airports; (4) violated minimum altitude and

[1] "C.A. App." refers to the appendix filed in the court of appeals, a copy of which has been filed in this Court.

visibility regulations at those airports; (5) operated flights at Johnstown airport without obtaining required weather data; (6) adopted improper procedures for reporting equipment malfunctions; (7) falsified aircraft maintenance records; (8) operated aircraft on commercial flights in an unairworthy condition;[2] (9) utilized pilots who had not passed required flight checks; (10) falsified pilot training records; and (11) coerced or intimidated its pilots and mechanics to comply with these illegal, unapproved, or unsafe procedures (Pet. App. A20–A31, A60–A65). Petitioners McKinney, Tallent, and Wilkinson were found to have engaged in the following practices, *inter alia,* on numerous occasions while acting as pilot-in-command of Air East flights: (1) operated aircraft which exceeded weight and center-of-gravity limitations; (2) used unapproved instrument landing approach procedures at two airports; (3) violated minimum altitude and visibility regulations at those airports; (4) deviated from air traffic control clearances without permission; (5) failed to maintain minimum required distances from clouds (Pet. App. A33–A38, A57–A60). With respect to Air East's repair station and petitioner Reddecliff, Air East's chief mechanic,

[2] Former Air East pilots testified that they had operated planes, with commercial passengers on board, with one or more of the following required items of equipment inoperative: flaps, fuel boost pump, fuel guage, altimeter, air speed indicator, landing lights, and windshield defroster (C.A. App. VIII, 1040–1042; IX, 1342–1350; X, 1790–1791). Some Air East pilots habitually carried plastic ice scrapers so that while the plane was airborne with passengers, they could open a side window and scrape the ice off the windshield so they could see the runway when landing (C.A. App. IX, 1342–1344).

the Board found numerous instances in which (1) aircraft had been returned to service without required work having been performed in a proper manner; (2) aircraft or aircraft parts had been returned to service without an inspection for airworthiness by a qualified inspector; (3) maintenance records had been falsified (Pet. App. A38–A43, A54–A57). The Board concluded (Pet. App. A65):

> [W]hat emerges from the record is the profile of a company which, through its management, initiated and fostered practices that are in violation of numerous provisions of the FAR [Federal Aviation Regulations] and that have compromised safety in every phase of the company's operational and maintenance functions. Air East has thereby demonstrated that it does not possess the care, judgment, and responsibility required of the holder of an air taxi/commercial operator certificate and that revocation thereof is warranted.

The Board also rejected petitioners' numerous procedural arguments (Pet. App. A45–A54, A65–A66).

Petitioners then petitioned the United States Court of Appeals for the Third Circuit for review pursuant to 49 U.SS.C. 1429 and 1486. That court unanimously affirmed the Board's order, holding that the Board's findings were supported by substantial evidence and that none of petitioners' procedural rights was violated (Pet. App. A4–A18).[3]

[3] Pursuant to Section 602(b), 72 Stat. 776, 49 U.S.C. 1422(b), petitioner Reddecliff requalified for a mechanic's certificate one year after revocation of his prior certificate, and the Administrator issued a new certificate to him on July 25, 1975.

ARGUMENT

The decision of the court of appeals is correct, particularly in light of petitioners' flagrant safety violations found by the Board. The decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. a. Petitioners' primary contention is that the Due Process Clause prevents the Administrator of the F.A.A. from summarily revoking their aviation certificates, thereby halting Air East's operations, upon finding the safety violations described above (Pet. 7–20). Petitioners argue that they should have been allowed to continue their operations pending completion of an administrative hearing. But, as the opinion of the court of appeals demonstrates, the procedure followed in this case is expressly authorized by the Federal Aviation Act and is constitutionally valid.

Air carriers such as Air East hold their aviation certificates subject to the duty "to perform their services with the highest possible degree of safety in the public interest." Section 601(b), 72 Stat. 775, 49 U.S.C. 1421(b). The procedure for imposing suspensions or revocations of these certificates is set forth in 49 U.S.C. 1429, 1485(a), and 1486 (see Pet. App. A1–A3; p. 2, *supra*). The holder of the certificate is entitled to prior notice of the charges and an opportunity to reply except when, as here, the Administrator finds "an emergency requiring immediate action exists in respect of safety in air commerce." 49 U.S.C. 1485(a). Any person adversely affected by the Administrator's order may appeal to

the Board, an independent agency. The filing of an appeal stays the effectiveness of the order unless, as here, "the Administrator advises the * * * Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the * * * Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator." 49 U.S.C. 1429.[4]

The Board decides appeals *de novo,* and the Administrator has the burden of proving his complaint. 14 C.F.R. 421.24. The Board's regulations provide for a full evidentiary hearing before an impartial administrative law judge (14 C.F.R. 421.22–421.33), whose decision is appealable to the Board itself (14 C.F.R. 421.34 to 421.37). The Board's decision is, in turn, reviewable by a court of appeals. 49 U.S.C. 1429, 1486.

Thus, although the Administrator's initial orders in this case were called emergency "revocations," in effect, because petitioners filed administrative appeals, the initial orders merely suspended their certificates for a maximum of sixty days from the date the Administrator advised the Board of the emergency. Within that period, the Board was required to issue a

[4] There is no merit to petitioners' argument (Pet. 17–18) that the Administrator must personally certify the emergency. This argument is based upon 14 C.F.R. 13.19(d), which provides that "the Administrator's order is stayed unless *he* advises the board that an emergency exists" (emphasis added). Pursuant to 14 C.F.R. 1.1, however, "Administrator" includes the Administrator's delegate. In the present case, the certificate was properly executed by the Administrator's chief counsel for appellate proceedings (see C.A. App. I, 38).

final order that would supersede the Administrator's initial orders.

This emergency revocation procedure does not deny due process of law. "[I]t has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." *Goldberg* v. *Kelly,* 397 U.S. 254, 263, n. 10, quoting from *R. A. Holman and Co.* v. *Securities and Exchange Commission,* 299 F. 2d 127, 131 (C.A.D.C.), certiorari denied, 370 U.S. 911. Thus, a prior hearing is not required for seizure and destruction of food unfit for human consumption (*North American Cold Storage Co.* v. *Chicago,* 211 U.S. 306); summary seizure of property to collect taxes (*Phillips* v. *Commissioner,* 283 U.S. 589); transfer of bank assets to a conservator (*Fahey* v. *Mallonee,* 332 U.S. 245); seizure of mislabeled drugs (*Ewing* v. *Mytinger and Casselberry, Inc.,* 339 U.S. 594); revocation of a security clearance necessary for particular employment (*Cafeteria Workers* v. *McElroy,* 367 U.S. 886); or discharge of government employees (*Arnett* v. *Kennedy,* 416 U.S. 134). A commercial airline engaged in the unsafe practices recited in the revocation orders endangers human life and thus presents a threat far more serious than that at issue in most of the above cases where summary procedures were upheld.[5] Moreover, the emer-

[5] The standards for imposing summary actions in these cases were comparable to the standard of 49 U.S.C. 1485(a): "an emergency requiring immediate action * * * in respect of safety in air commerce." Thus, there is no merit to petitioners' contention (Pet. 15–17) that the standard at issue here is unduly

gency revocations were imposed only after a thorough investigation in which the accusations of "grave wrongdoing * * * were supported by statements of apparently knowledgeable individuals" (Pet. App. A12).

Petitioners' reliance upon such cases as *Fuentes* v. *Shevin,* 407 U.S. 67, and *Bell* v. *Burson,* 402 U.S. 535, is misplaced because those cases did not involve summary action by a public official taken to protect human life. Similarly, in the recent school suspension case, *Goss* v. *Lopez,* 419 U.S. 565, 582–583, this Court stated:

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vague, particularly as applied to Air East's flagrant safety abuses.

Petitioners misleadingly assert that Air East's January 6, 1974, accident "was not shown to be related to * * * any of the violations alleged in the complaint" (Pet. 15). The Board issued its report on the probable cause of the accident while this case was pending on appeal, and a copy of the Board's summary was furnished to the court below. The Board failed to determine the exact cause of the accident but described it as probably the result of a "deliberate descent below the published minimum descent altitude" combined with other factors. NTSB Aircraft Accident Report No. NTSB–AAR–75–3, dated January 15, 1975, p. ii. The Board also found that the aircraft that crashed had taken off with two items of equipment inoperative, that its load manifest was falsified as to takeoff weight, that it was outside allowable center-of-gravity limits when it crashed, and that its pilot's and copilot's check flight records had been falsified (Report, *supra,* at 2–6), although these violations were not found to have been causally related to the crash. We are lodging a copy of the Accident Report with the Clerk.

Petitioners also rely upon two System Worthiness Analysis Program reports on Air East which the F.A.A. completed before the crash (Pet. 14), but they do not cite the Board's finding that "the failure of these inspections to uncover the violations established herein is in large measure attributable to the record falsifications designed to assure that such violations would not be detected" (Pet. App. A65).

> Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable * * *.

A fortiori, summary action was constitutionally appropriate here.

b. Prior to the court of appeals' decision in the present case, two district courts had held the emergency revocation procedure invalid. But see *Aircrane, Inc.* v. *Butterfield,* 369 F. Supp. 598 (E.D. Pa.). In the first of these, *United States* v. *Harper,* 335 F. Supp. 904 (D. Mass.), vacated as moot, 406 U.S. 940, the court misapprehended the nature of the revocation order because it stated that an emergency *suspension* of a certificate without any hearing would have been valid. As discussed above, the holder of a certificate can, in effect, convert the emergency "revocation" into a suspension merely by contesting it. The other decision, *Priority Air Dispatch, Inc.* v. *Brinegar,* Civil No. 1573–73, D.D.C., decided August 15, 1973, preliminarily enjoined enforcement of an emergency revocation order on the ground that prior notice and hearing were required. In so holding, however, the court did not cite or discuss any of this Court's precedents discussed above, which are inconsistent with its holding. A later Board order in *Priority Air* was subsequently reviewed by the Court of Appeals for the District of Columbia Circuit, which expressly noted that the correctness of the district court's preliminary injunction was not at issue. *Priority Air Dispatch, Inc.* v. *National Transportation Safety Board,*

514 F. 2d 1335, 1336; but see *id.* at 1342 (Danaher, J., concurring and dissenting). Thus, there is no conflict among the courts of appeals, and the opinion below, which is the only well-considered decision regarding the constitutionality of the emergency revocation procedure, is fully in accord with this Court's recent decisions.

2. Petitioners also raise numerous other procedural contentions. These arguments, too, were correctly rejected by the court of appeals and the Board and do not warrant further review.

a. First, petitioners contend that the administrative complaints were inadequate because they failed to allege specific dates and other details (Pet. 21–23). There is no constitutional or regulatory requirement that the complaints contain such detailed allegations. See *Cella* v. *United States,* 208 F. 2d 783 (C.A. 7), certiorari denied, 347 U.S. 1016. Moreover, as the court below noted (Pet. App. A13–A15), wherever possible, such specific dates, names, places, aircraft numbers, and other details were provided by the Administrator in the bills of particulars (C.A. App. I, 77–243) and through comprehensive discovery.[6]

[6] Petitioners are wrong in asserting that the bills of particulars were "deceptions" (Pet. 22, n. 11) because the law judge's findings were unspecific. The "unusually well-detailed" (Pet. App. A15, n. 15) opinion of the law judge contains many specifications of precise dates and other identifying details (*e.g.*, Pet. App. A72, A75, A82, A83, A85, A90–A91, A93–A94, A96–A98). Moreover, pursuant to the Board's interlocutory decision (C.A. App. II, 383–385), the law judge excluded evidence, except as offers of proof, which pertained to violations that were not specified in the bills of particulars (Pet. App. A45; see *e.g.*, Pet. App. A71, A121).

b. Petitioners also assert that charges relating to offenses that occurred more than six months before the revocation orders should have been dismissed as stale under 14 C.F.R. 421.25 (Pet. 23–25). The six-month limitation is expressly inapplicable to charges alleging lack of qualification of the certificate holder, and the complaints against all petitioners made that allegation (C.A. I, 5, 10, 15, 20, 23, 26, 38). As the Board held in properly construing its own regulations, "[l]ack of qualification can be established by regulatory violations sufficiently serious in nature to demonstrate a lack of the degree of care, judgment, and responsibility required of a certificate holder" (Pet. App. A49, n. 92). See *Nadiak* v. *Civil Aeronautics Board,* 305 F. 2d 588 (C.A. 5), certiorari denied, 372 U.S. 913.

c. Petitioners next argue that charges relating to Air East's intimidation of pilots and use of unapproved landing approaches should have been dismissed because such conduct did not violate any statute or regulation (Pet. 25–26). With respect to Air East's intimidation of its pilots, the Board acknowledged that no regulation had been violated, but properly concluded that such action was relevant to the "insistence of Air East management that the pilots accept irregular practices without dispute" (Pet. App. A65). These other irregular practices were found to have violated specific regulations. Thus, it was correct for the Board to consider its finding of intimidation—the accuracy of which Air East does not here challenge—in relation to Air East's responsibility for the regulatory violations by its pilots specified in the other

charges against Air East. Petitioners also err in contending (Pet. 26) that use of an "unapproved" approach does not violate 14 C.F.R. 91.116(a). Unless otherwise authorized, that provision requires use of "standard" instrument approaches, *i.e.*, those which the Administrator has "adopted." 14 C.F.R. 97.10 (see Pet. App. A57, n. 105).

d. Equally without merit is petitioners' claim that all charges should have been dismissed because the Administrator sent the Board's chairman a letter, which petitioners contend contained "prejudicial and defamatory remarks" (Pet. 26). The letter informed the chairman that the Administrator had received complaints, which he was investigating, by former Air East pilots that Air East was retaliating against them for their testimony in the Board's proceeding (C.A. App. I, 253–254). The president of Air East responded by affidavit to the substance of these complaints (C.A. App. I, 252). Both the court below and the Board concluded that this letter did not provide any basis for dismissing the charges against petitioners, and this finding is plainly correct (Pet. App. A15, n. 15; A49).[7]

e. Although petitioners also contend that the administrative law judge's decision failed to make adequate findings and conclusions (Pet. 27–30), the court of appeals properly characterized that decision as "com-

[7] The chairman did disqualify himself on the basis of this letter, but in so doing he stated that the letter did not affect his impartiality although it might present "a scintilla of doubt in the minds of some * * *" (C.A. App. II, 381). The chairman had not disclosed the letter to the other Board members nor discussed it with them (C.A. App. I, 265–266).

prehensive and unusually well-detailed" (Pet. App. A15, n. 15), and the Board correctly held that the decision satisfies the requirements of the applicable regulation, 14 C.F.R. 421.32(b) (Pet. App. A51). The decision, which was delivered orally, contains specific findings on each charge (see Pet. App. A67–A134).[8] Moreover, by failing to object to the adequacy of the findings before the law judge (see Pet. App. A133–A134), petitioners are precluded from challenging them now.

f. Petitioners also contend that both the Board and the court below applied erroneous legal tests in evaluating the conflicting evidence (Pet. 30–35). Essentially, however, this contention is merely that the law judge should have accepted petitioners' self-serving denials of the charges against them instead of accepting the testimony of the Administrator's numerous witnesses, who included seventeen former Air East pilots and four former Air East mechanics. The court below properly declined to overturn the Board's findings as to the credibility of the witnesses and correctly con-

[8] Petitioners also argue that the law judge supported three findings by citing testimony of witnesses, who, in fact, did not support those findings (Pet. 29). In each instance, however, the law judge also relied upon the testimony of other witnesses whom petitioners do not attempt to discount (Pet. App. A117, A119, A124–A125). Moreover petitioners' claim is factually incorrect because the testimony of Montague (C.A. App. IX, 1339–1341) and Sayther (C.A. App. XI, 1945, 1968–1970 (offer of proof)) does support a finding that Tallent flew unairworthy aircraft (Charge 4(e)); Montague also testified (C.A. App. IX, 1332–1333) as to McKinney's use of unauthorized landing approaches (Charge 4(a)); and Howell testified (C.A. App. XIV, 2897–2904) as to Wilkinson's use of unauthorized landing approaches (Charge 3(a)).

cluded that the voluminous record contains more than the necessary substantial evidence to sustain the Board's revocation orders (Pet. App. A15).[9]

g. Petitioners also complain that they lacked adequate time to prepare their administrative appeal and that the Board should have granted oral argument (Pet. 36–37). As the court below noted, however, the stringent time limits governing Board appeals are for the benefit of persons, such as petitioners, who seek immediate review of a revocation order (Pet. App. A10, n. 8). The Board informed petitioners that they could waive the expedited procedures (C.A. App. I, 33), but they chose not to do so. Similarly, the board normally does not hold oral argument in expedited appeals (see 14 C.F.R. 425.25; Pet. App. A45). But full oral arguments were presented to the Board's administrative law judge (C.A. App. XVI, 3807–3843) and transcripts of these were available to the Board. Nor has the Board ignored petitioners' arguments. The Board's decision refutes point-by-point the arguments raised in petitioners' written brief. In these circumstances, oral argument before the Board was not constitutionally required. See *Federal Communications Commission* v. *WJR*, 337 U.S. 265.

[9] Petitioners' argument (Pet. 35) that Air East was not responsible for the admitted falsification of pilot check-flight records by its employee ignores the Board's findings that the employee understood from petitioner McKinney that he was expected to falsify the records in order to keep the pilots flying and that McKinney, who was Air East's vice-president, was aware of the falsifications (Pet. App. A63; see also Pet. App. A103–A107).

h. Petitioners also assert that many of the regulations they were held to have violated are either unconstitutionally vague or inapplicable to this case (Pet. 37–38).[10] The vagueness claim is unmeritorious, particularly because no criminal sanctions or First Amendment rights are at issue. Cf. *Parker* v. *Levy*, 417 U.S. 733. In addition, the Board's decision (Pet. App. A20–A43) carefully relates each charge to the regulations it held applicable, and its holdings in this regard are correct.

i. Finally, petitioners contend that revocation of their certificates was not an authorized sanction (Pet. 38–39). That sanction is expressly authorized by 49 U.S.C. 1429, however, and has long been imposed when the regulatory violations are sufficiently serious to demonstrate that the certificate holder lacks requisite care, judgment, and responsibility (see Pet. App. A49, n. 92). *E.g.*, *Nadiak* v. *Civil Aeronautics Board, supra.* Revocation was appropriate here, where petitioners were found to "have compromised safety in every phase of [Air East's] operational and maintenance functions" (Pet. App. A65).

[10] For example, petitioners assert 14 C.F.R. 91.9 is unduly vague. That regulation provides: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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